90-28

CASE NO. _____

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

WILLIAM C. NEWTON,
Petitioner,

v.

W. R. GRACE & CO. AND
DEL TACO CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1.

DOES THE BURDINE RULE ALLOWING EMPLOYMENT DISCRIMINATION PLAINTIFFS A FULL AND FAIR OPPORTUNITY TO SHOW AN EMPLOYER'S ARTICULATED NON-DISCRIMINATORY REASON FOR DISCHARGE WAS MERELY A PRETEXT ALLOW A PLAINTIFF TO ATTACK THE EMPLOYER'S FACTUAL BASIS TO PROVE PRETEXT?

LIST OF PARTIES SEEKING REVIEW

This Petition's caption includes all of the Parties seeking review.

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STATUTES AND RULES

28 U.S.C. Sect. 2101(c);

29 U.S.C. Sect. 623(1);

F.R.E. 401.

OFFICIAL AND UNOFFICIAL REPORTS DELIVERED

William C. Newton v. W.R. Grace & Company and Del Taco Corporation, (No. 85-04725 C-A N. Dist. Ga. November 16, 1987).

JURISDICTIONAL STATEMENT

This Court has jurisdiction because the 11th Circuit has rendered an opinion in William C. Newton v. W.R. Grace & Company and Del Taco Corporation (11th Cir. No 87-8961 May 24, 1989), that conflicts with one of this Court's opinion's. This Court provided in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 258, 101 S.Ct. 1087, 1096, 67 L. Ed. 207 (1981) that Courts must allow Plaintiffs in Employment Discrimination cases a "fair and full opportunity" to present a prima facia case, and rebut the Employer's alleged legitimate non-discriminatory reason for the challenged employment decision. The 11th Circuit's Appellate decision in the present case conflicts with this Court's Burdine mandate.

The 11th Circuit entered on April 6,

1990, its appellate decision denying Petitioner's Petion for Rehearing and affirming the Trial Court's Directed Verdict against Petitioner.

This Court has jurisdiction to hear this Writ of Certiorari pursuant to 28 U.S.C. Sect. 2101(c).

STATUTES AND RULES

28 U.S.C. Sect. 2101(c);

29 U.S.C. Sect 623(1);

F.R.E. 401.

(See Appendix).

STATEMENT OF THE CASE

The basis for federal jurisdiction in the first instance in the Northern District of Georgia United States District Court was federal question jurisdiction pursuant to 29 U.S.C. Sect.s 621 et. seq. (R1-1).

The facts of this case are as follows. In September, 1982, Respondent hired Louis Neeb as its President of Del Taco's Fast Food Division (R6--375-78). Neeb testified at trial he had received complaints about Petitioner from within and outside Del Taco. Neeb testified that Petitioner had overstocked obsolete inventory, and had overestimated the profitability of the average restaurant. Further Neeb testified he had received complaints from within the fast food Division from Bill palmer. Neeb stated

Palmer complained about Petitioner's lack of credibility in setting up the breakfast pilot program, opening a new restaurant in Houston, responding to operations hot line requests, and developing a new taco meat product (R6-387-88). Also, Neeb testified he received complaints from suppliers who had dealt with Newton. Specifically, Neeb testified he had received complaints from Jim Peterson, the president of another fast food chain, that Del Taco's purchasing department had a reputation for shopping sealed bids and "whipsawing" suppliers to get a lower price (R-390). Further, Neeb testified that Jack Brown, President of a sign company, Dick Rivera, who became President of Del Taco, and Bill Glennon, Southwest Regional Manager and later Vice-President of Operations, and Mike Jacobs, one of the Southeast District

Managers, complained about problems communicating with Petitioner and getting any response from him on problems in the field (R6-448-50).

Petitioner attempted to introduce his own testimony to rebut Respondent's evidence that his job performance was unsatisfactory, thus showing such reason for firing him was simply a pretext. However, the Trial Court refused to admit such evidence. Petitioner appealed to the 11th Circuit. The 11th Circuit affirmed the Trial Court's refusal to admit such pretext evidence.

ARGUMENT AND CITATION OF AUTHORITY

1.

THIS COURT SHOULD GRANT CERTIORARI AND HEAR THIS CASE BECAUSE THE 11TH CIRCUIT DID NOT ALLOW AN EMPLOYMENT DISCRIMINATION PLAINTIFF A FULL AND FAIR OPPORTUNITY TO PROVE PRETEXT IN THAT THE COURT DID NOT ALLOW PETITIONER TO CHALLENGE THE FACTUAL BASIS FOR THE EMPLOYER'S ARTICULATED NON-DISCRIMINATORY REASON FOR HAVING FIRED PETITIONER.

At trial Petitioner attempted to challenge Respondent employer's factual basis for discharging Petitioner. The Trial Court granted Respondent's directed verdict motion. The 11th Circuit affirmed the Trial Court. William C. Newton v. W.R. Grace & Company and Del Taco Corporation (No 87-8961 April 6,1990 11th Circuit). In so doing the 11th circuit rendered an opinion which conflicts with other Circuit's decisions regarding the specific point involved. Id. Further, the

11th Circuit's opinion conflicts with this Court's mandate in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 258, 101 S.Ct. 1087, 1096, 67 L. Ed. 2d 207 (1981). Id. Specifically, the 11th Circuit did not allow Petitioner to challenge the factual basis for the employer's articulated non-discriminatory reason for having discharged Petitioner. Petitioner requests this Court grant his Writ of Certiorari to resolve this violation of Burdine and conflict with the other circuits.

Burdine, supra, clearly allows an Employment Discrimination plaintiff to challenge an employer's factual basis for an employment decision. This procedure provides a plaintiff an opportunity to prove the employer's reason was simply a pretext for an illegal, discriminatory

reason. In Burdine this Court stated:

> Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions.
>
> The plaintiff retains the burden of persuasion. She now must have the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision. This burden now merges with the ultimate unburden of persuading the court that she has been the victim of intentional discrimination. She may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. See McDonnell Douglas, 411 U.S. at 801-805.

Burdine, 450 U.S. at 255-256.

How does the above language from Burdine allow a Plaintiff to challenge an

Employer's factual basis for its articulated non-discriminatory reason for discharge? Burdine states at least two ways that challenging an employer's factual basis is allowed. First, Burdine states that a Plaintiff may show pretext by showing a discriminatory reason more likely motivated the employer. Inherent in this statement is the notion of challenging the employer's factual basis. To prove that a discriminatory reason, such as age, was really the motivating factor, the plaintiff must be able to show what the facts were that surrounded the employer's decision. In so doing the Plaintiff would have an opportunity to show the facts did not support the Employer's asserted non-discriminatory reason for firing him, indicating the real reason was an illegal, discriminatory one.

Burdine establishes another way that a Plaintiff can challenge an employer's factual basis. Burdine states that a Plaintiff may indirectly prove pretext by showing the employer's proffered explanation is unworthy of credence. Id. This, too, requires that a plaintiff be allowed to attack the employer's factual basis. Specifically, the way for a plaintiff to show a trier of fact it can't believe an employer's proffered reason is to introduce evidence contradicting the employer's reason. Such contradiction shows the employer's reason was not believable. Further, introducing a sufficient amount of evidence contradicting the employer's testimony creates the inference that the employer did not in good faith believe its articulated reason.

One of the most common reasons employers use to justify challenged employment decisions is the employee was not adequately performing the job duties. Respondent employer in the present case used this reason to justify its decision to discharge Petitioner. At trial Respondent produced evidence that it received complaints about Petitioner's job performance. (See Statement of the Case, supra, for exact testimony).

It is exactly the above asserted employer factual basis that Burdine intended employment discrimination Plaintiffs be allowed to challenge. "Satisfactory job performance" is a subjective phrase. Respondent's decision to fire Petitioner based on his alleged "unsatisfactory job performance", therefore, is a subjective decision.

Respondent could have used this subjective decision to camouflage a discriminatory reason for firing Plaintiff such as age. Courts readily recognize that employer's may use subjective criteria, instead of objective criteria, to masque employment decisions using illegal reasons such as age:

> ...Objective criteria is favored by the courts since subjective criteria may be an effective shield for discriminatory practices. Rowe v. General Motors Corporation, 457 F.2d 348 (5th Circ. 1972); Lee v. Conecuh County Bd. of Education, 634 F.2d 959, 963 (5th Cir. 1981); Abrams v. Johnson, 534 F.2d 1226 (6th Cir. 1976). Subjective criteria may be a valid factor that an employer considers, but it should be combined with meaningfully applied objective criteria which indicates the selection was inherently fair. Rowe at 359; See Nath v. General Electric Co., 438 F. Supp. 213 (E.D. Pa. 1977), aff'd, 594 F.2d 855 (3rd Cir. 1979); Rowe v. Cleveland Pneumatic Co., Numerical Control, Inc., 690 F.2d 88 (6th Cir. 1982). Any procedure employing subjective criteria will be carefully scrutinized to prevent abuse. Id.

at 93.

Nichelson v. Quaker Oats Co., 573 F. Supp. 1209 (W.D. Tenn. 1983).

Here, Respondent made an employment decision, firing Petitioner, based on the subjective notion that Petitioner's job performance was unsatisfactory. In response, Petitioner attempted to attack Respondent's factual basis to reveal that Respondent's articulated reason was not worthy of credence. Specifically, Petitioner offered his own testimony, including successful business transactions with numerous suppliers, to show his job performance had been excellent. Thus, had the Trial Court allowed Petitioner's testimony, this would have inferentially shown Petitioner's age had been one of the factor's that had motivated Respondent's employment decision. This would have created a fact issue regarding

Respondent's motives, requiring the Trial Court submit this case to the jury.

Despite Petitioner's efforts to challenge Respondent's factual basis, the Trial Court erroneously excluded Petitioner's evidence. Thus, the Trial Court denied Petitioner his right under Burdine to challenge Respondent's factual basis.

In denying Petitioner's right under Burdine to challenge Respondent's factual basis, the Trial Court contradicted itself in a way that supports Petitioner's theory and the majority of other Circuit's interpretations' of Burdine. The Trial Court stated Plaintiff-Petitioner's evidence was inadmissible to prove pretext, but at the same time revealed a legal basis it could have used to admit Plaintiff-Petitioner's pretext evidence.

Specifically, the Trial Court held that one way to show pretext was to show Respondent had reason to think the alleged complaints against Petitioner were false by stating that:

> ... the focus is on the motives of the people who terminated the plaintiff. Mr. Neeb and Mr. Rivera testified that they terminated Mr. Newton because they had received various complaints about his performance. In order to show that they really terminated Mr. Newton because of his age and not because of these because of these reported complaints, you would be entitled to show that they didn't receive these complaints, or if they did receive them, <u>that they had reason to think that they were false</u> (emphasis added), or you would be entitled to bring in evidence to seek to show that these were such inconsequential matters that they couldn't have possibly been the real reason for terminating Mr. Newton.
>
> The issue of what actually happened that caused the subordinates to complain to Mr. Rivera isn't relevant. What you are trying now to do is come back and say no, Mr. Roderman, Mr. Palmer, Mr. Puryear, Mr. Jacobs, witnesses like that were wrong when they testified that Mr. Newton did

> certain things they didn't like, and that is legally irrelevant to the issue of motive in a discrimination case such as this one.

(R7-721 to 722).

By stating that Petitioner had a right to show pretext by showing Respondent-employer did not believe the complaints, the Trial Court indicated its own error in excluding Plaintiff's pretext evidence. That was exactly what Petitioner had attempted to do. Burdine states that Petitioner may show pretext by showing the employer's proffered reason for firing was not believable. Burdine, and most of the Circuits interpreting Burdine, allow Petitioner to show the employer's proffered reason was unbelievable by inference as opposed to direct evidence. Burdine, supra. Here, Petitioner's pretext evidence of his more than satisfactory job performance as revealed

by successful transactions with numerous suppliers would have raised an inference that Respondent's reason for firing him was a pretext to substitute a lower paid younger employee for the higher paid older worker. The Trial Court erroneously cut off Petitioner's right to raise this inference and submit the case to the jury on this and other factual questions.

The 11th Circuit Court of Appeals compounded the problem, erroneously holding that Petitioner's pretext evidence was inadmissable because the employer only needed a "good faith basis" for believing Petitioner's performance was unsatisfactory. The 11th Circuit held that the jury need not determine whether the employer was in fact correct about Plaintiff-Petitioner's job performance, stating:

Grace argues that Newton's testimony regarding objective correctness of events underlying the suppliers' complaints is not relevant in demonstrating that Graces actions were a pretext for rage discrimination. Grace asserts that where an employer's articulated reason for dismissal is that he relied on outside suppliers' complaints, the employer need only show that he believed the complaints were true, not that they were objectively correct.

Grace's position is persuasive. In Moore v. Sears Roebuck & Co., 683 F.2d 1321 (11th Cir.1982), this court stated that:

> It is well settled in employment discrimination cases such as this that for an employer to prevail the jury need not determine that the employer was correct in its assessment of the employee's performance; it need only determine that the defendant in good faith believed plaintiff's performance to be unsatisfactory and that the asserted reason for the discharge is therefore not a mere pretext for discrimination.

Id. at 1323 n.4 (emphasis in original).

The 11th Circuit applied its "good

faith rule" in such a way that conflicts with Petitioner's rights mandated by Burdine. As mentioned above, Burdine allows Plaintiffs a "full and fair opportunity" to prove pretext. Burdine, supra. The full and fair opportunity allows Plaintiffs to show "that the employer' proffered explanation is unworthy of credence". Id., 411 U.S. at 804-05. This includes allowing the Plaintiff to show the proffered employer reason was not believable, which inherently involves the Plaintiff's attacking the Defendant employer's factual basis. Therefore, 11th Circuit's use of the "good faith basis" rule to prevent a Plaintiff from introducing evidence to show the employer's good faith basis was not believable, and therefore a pretext, directly conflicts with this Court's

Burdine rule.

The 11th Circuit's present decision also conflicts with the Second Circuit. See Sweeney v. Research Foundation of State University of New York, 711 F.2d 1179, 1185-87 (1983). The Second Circuit in essence has indicated that the employer must have a factual basis for its proffered reason, and that the employee may attack the factual basis. Id.

Although the Sweeney Court held for the defendant-employer, it's analysis of the Defendant's burden, coupled with the Plaintiff's right to show pretext, indicates Plaintiffs have a right to submit evidence to challenge a defendant's factual basis and thereby show pretext. The Sweeney Court interpreted an employer-defendant's burden in Burdine as follows:

> In Burdine, the Court clarified the nature of the defendant's burden

under McDonnell Douglas. The Court emphasized that the defendant's burden is one of production, not persuasion. This burden can be met if the evidence presented by the defendant, setting forth the reasons for rejection of the plaintiff, "raises a genuine issue of fact as to whether [defendant] discriminated." 450 U.S. at 254, 101 S.Ct. at 1094. Under Burdine, the reasons set forth by the defendant must be "articulated with some specificity," Loeb v. Textron, Inc. 600 F.2d 1003, 1012 n. 5 (1st Cir. 1979), in order to provide the plaintiff with "a full and fair opportunity to demonstrate pretext"--i.e., that the non-discriminatory reason advanced by the defendant was not the true reason for the rejection. Burdine, 450 U.S. at 254-56, 101 S.Ct. at 1094-95.

Moveover, the evidence produced by the employer should be objective and competent. Subjective evaluations are not adequate by themselves because they may mask prohibited prejudice. Knight v. Nassau County Civil Service Commission, 649 F. 2d 156, 161 (2d Circ.), cert. denied 454 U.S. 818, 102 S.Ct. 97, 70 L.Ed. 87 (1981); see Crawford v. Western Electric. Co., 614 F.2d 1300, 1313-17 (5th Cir. 1980); United States v. N.L. Industries, Inc. 479 354, 372 (8th Cir. 1973).

Id. at 1185.

The Second Circuit's above analysis in Sweeney interprets Burdine to allow Plaintiffs to submit evidence to challenge the employer-defendant's factual basis for its articulated non-discriminatory reason. This conclusion is inescapable under the above analysis. The Sweeney Court allows a plaintiff a full and fair opportunity to demonstrate pretext in response to any fact issue the employer has raised regarding the question of discrimination. Under Sweeney, Petitioner would have been permitted to admit his pretext evidence.

Even the 11th Circuit has, in one of its earlier decisions, agreed with the Second Circuit's Sweeney interpretation of Burdine, directly contradicting its present case's Burdine interpretation. Sweat v. Miller Brewing Co., 708 F.2d 655 (11th Cir. 1983). In Sweat , the

defendant's articulated reason for firing the plaintiff was that she had lost credibility in the company because she had taped an exit interview of another employee. Id. at 656. The 11th Circuit allowed the plaintiff to challenge the factual basis for the defendant's alleged reason for firing her. Specifically, the 11th Circuit quoted Burdine by stating:

> An employee may demonstrate pretext either directly by persuading the court that discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. Texas department of Community Affairs v. Burdine, 450 U.S. 248, 256, 101 S.Ct. 1089, 1095, 67 L.Ed.2d 207 (1981).

Sweat, supra at 656. In Sweat the 11th Circuit properly followed Burdine, allowing the plaintiff to challenge the employer's factual basis. The 11th Circuit's departure from Burdine in the

present case can be explained only by concluding that it made a clear error of law.

In Sweat, the 11th Circuit specifically allowed the plaintiff to introduce evidence to "support her claim that the supervisor's criticisms of her were not factually supported". The evidence admitted to attack the employer's factual basis included an affidavit and deposition testimony regarding the employer's discriminatory intent, coupled with testimony from other employees to contradict the employer's criticisms of her.

The 11th Circuit in Sweat reversed the Trial Court's grant of summary judgment in favor of the defendant. The 11th Circuit stated in Sweat that the plaintiff's evidence had presented a:

> "question of fact as to whether the stated reason for her dismissal from Miller Brewing Company was a pretext for discrimination....We intimate no view as to the ultimate outcome of this case, but simply hold that the factual dispute concerning the employer's intent must be submitted to the trier of fact....Whether Carlson's alleged "breach of professionalism" was actually the reason for her discharge is a question for the trier of fact.

Id. at 657.

Had the 11th Circuit applied the same analysis in the present case as it did in Sweat they would have admitted Petitioner's pretext evidence, and reversed and remanded with instructions to allow this case to go to a jury on the "discriminatory intent" and "pretext" issues. Petitioner's evidence would have undercut Respondents allegation that his job performance had been inadequate. Petitioner's evidence would have revealed that many suppliers considered his

performance to be superlative.

Petitioner's evidence further would have shown that Respondent had not, as it claimed, given any warning to him , in meetings or otherwise, that they had considered his performance to be unsatisfactory. The 11th Circuit itself, in Sweat, indicated the lack of warnings was evidence tending to show pretext and discriminatory intent. For example, in Sweat, one of the factors the 11th Circuit considered in determine a fact issue existed regarding the employers discriminatory intent was the fact that:

> ...(plaintiff) claims there is no evidence that she was warned , suspended, reprimanded, or relieved of any duties during the seven weeks following the incident because of damage to her credibility or that of the department.

Sweat, Id. at 657.

The 11th Circuit has also rendered

another decision consistent with Petitioner's interpretation of Burdine that, despite the "good faith basis rule", a Plaintiff has the right to challenge the factual basis for an employer's articulated reason. Rosenfield v. Wellington Leisure Products, Inc., 827 F. 2d 1493, 1496 (11th Circuit); Cf. Mieth v. Dothard, 418 F. Supp 1169 (N.D. Ala. 1976).

The 11th Circuit's present decision also conflicts with the 5th Circuit. Parson v. Kaiser Aluminum & Chemical Corp. 575 F.2d 1374 (5th Cir. 1978). Parson involved the question of whether the employer's failure to promote the plaintiff had been racially motivated. The trial court had determined the plaintiff had not been qualified for the promotion. However, the principal

allowing plaintiffs to challenge the factual basis for the employer's decision again surfaced. The 5th Circuit reversed the trial court by stating:

> The District Court Judge offered no hints as to the basis for his finding that Parson was not qualified for promotion to the position of foreman. We are simply unable to determine whether the Judge found sufficient subsidiary facts to undergird the ultimate finding that the decision not to promote Parson was not racially motivated....It is therefor necessary for us to reverse the dismissal of Parson's claim and remand for an articulation of the basis for the Judge's conclusion that Parson was not qualified to become foreman. This articulation is to include an examination of the comparative qualifications of non blacks promoted to foreman.

Id. at 1383.

The 5th Circuit has indicated in Parson that a Plaintiff should have the opportunity to challenge the employer's factual basis for its alleged discriminatory employment decision. The

notion of having facts sufficient to "undergird the employer's decision", and examining the qualifications of the plaintiff compared to others, carries with it the Plaintiff's ability to challenge the employer's factual basis. In fact, the 5th Circuit's footnote 21 in Parson indicated it did allow the plaintiff to challenge the employer's allegations that his job performance was inadequate. Id., at 1383, footnote 21.

A district court case from the District of Columbia Circuit also grants Plaintiffs the right to challenge a defendant's factual basis for its ticulated reason. McNeil v. McDonough, 515 F.Supp. 113 (D.D.C. 1980). In McNeil the District of Columbia District Court stated that:

> Evidence of pretext, if it exists, may be found in any part of the

> case, whether on direct or cross-examination, and without regard to which side called the witness.

Id. The McNeil Court determined that the record in that case disclosed no evidence of pretext. However, McNeil is important because it indicates a Plaintiff may challenge a defendant's alleged factual basis, even through cross-examination, to show the defendant's articulated reason is really a pretext.

The 11th Circuit's application of the "good faith basis" rule also conflicts with a district court case from the Seventh Circuit. Maxfield v. Central States, Southeast and Southwest Areas Health, Welfare and Pension Funds, 559 F.Supp. 158 (N.D.Ill. 1982). As mentioned above, the 11th Circuit refused to allow Petitioner to challenge Respondent's alleged factual basis for its articulated

reason for having fired him. The 11th Circuit stated that an employer need only have a "good faith basis" for making an employment decision. The 11th Circuit stated that the truth or falsity of the factual basis was irrelevant regarding whether Respondent had fired Petitioner because of the illegal reason of age. Therefore, the 11th Circuit determined the District Court had correctly denied Petitioner's evidence that would have nullified Respondent's articulated reason.

However, the Northern District of Illinois in Maxfield interpreted Burdine in a manner that directly contradicts the 11th Circuit's application of the "good faith basis" rule. In Maxfield the Northern District of Illinois held that whether the employer's articulated reason was true or not was irrelevant. Even if

the employer's articulate reason was true, a plaintiff could still win the case by proving age had been "a determining factor" in the employer's employment decision:

> The plaintiff need not prove that the employer's articulated reason was false. "Instead, the plaintiff must prove that age was a determining factor (original emphasis) in the employer's decision; the employer's articulated reason may in fact have been true. But if age was also a determining factor in the employer's decision the plaintiff has carried his burden of proof." Golomb, supra, 688 F.2d at 551.

Id.

As Maxfield indicated, Burdine allows a plaintiff to challenge the employer's factual basis to show pretext. In Maxfield the employer presented evidence that the plaintiff's job performance had been unsatisfactory. The Northern District of Illinois denied the employer's summary judgment motion.

The 11th Circuit's present opinion also conflicts with the 10th Circuit's construction of Burdine allowing a plaintiff to challenge an employer's factual basis. Mohammed v. Callaway, 698 F.2d 395 (10th Cir. 1983). Mohammed involved the question of whether the employer had promoted another individual based on the plaintiff's race. The 10th Circuit in essence not only indicated a plaintiff could challenge an employer's factual basis to show pretext and therefore intentional discrimination, but also specified several types of evidence a plaintiff could introduce to challenge the employer's factual basis by stating that:

> Evidence relevant to such a showing includes: (1) the employer's prior treatment of the plaintiff, McDonnell Douglas, 411 U.S. at 804, 93 S.Ct. at 1825; (2) the employer's "general policy and practices with respect to minority employment," particularity statistics reflecting

> a general pattern and practice of discrimination, id. at 804-05, 83 S.Ct at 1822-26; (3) disturbing procedural irregularities, see Williams v. Boorstin, 663 F.2d 109, 117 (D.C.Cir. 1980); Williams v. DeKalb County, 577 F.2d 248,255 (5th Cir.), modified on other grounds, 582 F.2d 2 (5th Cir. 1978); and (4) the use of subjective criteria;, Bauer, 647 F.2d at 1045-46; Thornton v. Coffey, 618 F.2d 686, 691 (10th Cir.1980), especially when used to evaluate candidates that are not objectively equally qualified. [citation omitted].

Id. at 399. Also, this evidence simply must tend to prove pretext to be relevant and therefore admissible. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. F.R.E. 401. Further, the pretext evidence may be by inference, as Burdine itself states Plaintiff's may show pretext "indirectly". An inference is

admissible if it "is one that reasonable and fair-minded men in the exercise of impartial judgment might draw from the evidence." Daniels v. Twin Oaks Nursing Home, 692 F.2d 1321, 1326 (11th Cir. 1982).

The 10th Circuit's analysis in Mohammed under the above evidentiary guidelines highlighted the need for, and right to, a plaintiff's ability to challenge the employer's factual basis. The 10th Circuit indicated the employer had used subjective factors such as "dedication" and "enthusiasm" in deciding who was better qualified for the job promotion. The 10th Circuit stated that these criteria were subjective and "may offer a convenient pretext for giving force and effect to racial prejudice". [citation omitted].

By stating this analysis the 10th Circuit indicated that a plaintiff has a built in right, according to Burdine, to challenge the employer's factual basis to show the subjective words like "dedication" are a pretext, masking discriminatory motives. In fact, the Mohammed District Court had allowed the plaintiff to introduce evidence revealing pretext. Because the District Court had allowed the plaintiff to introduce evidence to challenge the employer's factual basis, the 10th Circuit was able to determine that the evidence supported an inference that the employer had intentionally discriminated against the plaintiff. As a result, the 10th Circuit reversed and remanded with instructions to enter judgment for plaintiff.

The 11th Circuit should have allowed

Petitioner to introduce evidence challenging Respondent's categorization of him as having "inadequate job performance". Just as in Mohammed, this type of wording constituted a subjective criteria used in the employer's challenged decision. The potential for covering up the discriminatory motive, age, for firing Petitioner, existed just as much in the present case as it did in Mohammed. Thus, as in Mohammed, the 11th Circuit should have allowed Petitioner his right under Burdine to admit pretext evidence challenging Respondent's factual basis.

CONCLUSION

The 11th Circuits application of the "good faith basis" rule conflicts with this Court's decision in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 258, 101 S.Ct. 1087, 1096, 67 L. Ed. 207 (1981). The 11th Circuit's opinion also conflicts with the majority of appellate and district courts in other Circuits which have interpreted Burdine. Most of the other circuits allow a Plaintiff to challenge an employer's alleged factual basis and require the District Court to state sufficient facts indicating the employer's articulated reason was not a pretext.

Petitioner, therefore, respectfully requests this Court grant his Writ of Certiorari to resolve the 11th Circuit's opinion's conflict with this Court's

Burdine decision and conflict with the majority of other Circuits.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have this 30th day of June, 1990, mailed a copy of Petitioner's Writ of Certiorari with adequate postage to the following address:

Margaret Campbell
1201 W. Peachtree Street, N.E.
Atlanta, Georgia 30309

Mark V Clark

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APPENDIX

April 6, 1990

Mark V. Clark
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120 Marietta Station Walk, Suite 270
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RE: 87-8961 Newton v. Grace & Company
DIST. CT. NO. -85-04725 C-A

cc:Luther D. Thomas
Homer L. Deakins
Margaret Campbell
William Newton Pro Se
Richard M. Vega

EXHIBIT A

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, NW
Atlanta, Georgia 30303
April 6, 1990

Miguel J. Cortez
Clerk

MEMORANDUM TO COUNSEL OR PARTIES:

RE: 87-8961 Newton v. Grace & Company
DC DKT No.: 85-04725 C-A

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellant Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Sincerely,

MIGUEL J. CORTEZ, Clerk

Reply To: Dwight Briggs (404) 331-3836

Encl.

REHG-1 (7/87)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 87 8961

WILLIAM C. NEWTON,
Plaintiff-Appellant,

versus

W.R. GRACE & COMPANY and
DEL TACO CORPORATION,
Defendants-Appellees

Appeal from the United States District Court for the Northern District of Georgia

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ON PETITION(S) FOR REHEARING

BEFORE: HATCHETT and CLARK, Circuit Judges, and FITZPATRICK*, District Judge.

PER CURIAM:

The petition(s) for rehearing filed by appellant, William C. Newton, is denied.

ENTERED FOR THE COURT:

United States Circuit Judge

* Honorable Duross Fitzpatrick, United States District Judge for the Middle District of Georgia, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 87 8961

D.C. Docket No. 85- 4725

WILLIAM C. NEWTON,

Plaintiff-Appellant,

versus

W.R. GRACE & COMPANY and
DEL TACO CORPORATION,

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Georgia

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(May 24, 1989)

Before HATCHETT and CLARK, Circuit Judges, and FITZPATRICK*, District Judge.

CLARK, Circuit Judge:

Appellant William C. Newton (Newton) seeks reversal of the district court's

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* Honorable Duross Fitzpatrick United States District Judge for the Middle District of Georgia, sitting by designation.

EXHIBIT B

directed verdict for the defendants. The district court directed a verdict in favor of the defendants because Newton failed to establish his case and the defendants had just cause to replace him. We have carefully reviewed the record in this case, the parties' briefs, and the applicable law. We affirm.

Newton sought relief under the Age Discrimination in Employment Act, 29 U.S.C. Section 621 et seq., which protects employees from unlawful discharge by reason of age. The statute protects individuals who are at least 40 years of age but less than 70. Del Taco Corporation, a subsidiary of W.R. Grace & Co., employed Newton in September, 1978, as its first Director of Purchasing. In 1981 he was promoted to Vice President in charge of purchasing,

but was discharged in February, 1984, at the age of 54. Newton's replacement was 41 years of age. Thus, both Newton and his replacement are within the prescribed age range.

Newton's case was based on a theory that in September 1982 the defendants Del Taco and Grace started a "youth movement" when Louis Neeb, 43 years old, was hired to head and assemble a new management team.[2] Del Taco had been losing large sums of money and Neeb, an experienced fast food business executive, was hired to reverse that situation. In November 1982, Neeb fired Richard Hynan, age 43, and Newton's supervisor, and replaced him with Richard Rivera, age 36.

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[2]Neeb also directed the acquisition and franchising of T.J. Applebee's, a restaurant chain.

Del Taco's profitability increased during the new management team's first two years. During this time, however, Neeb received complains about Newton from Del Taco operations employees and outside suppliers. The gist of the complaints was that Newton lacked credibility in his ability to perform his job or was heavy-handed in his dealings with suppliers. Neeb also claimed that he had discovered that Newton had overstocked obsolete inventory and made a major miscalculation in estimating food costs.

On December 8, 1983, Newton met with Neeb and Rivera ostensibly to discuss the possibility of Newton becoming a Del Taco franchisee. Neeb and Rivera, however, did not discuss a franchise but instructed Newton to work more closely

with two operations directors: Bill Palmer, the founder of and director of operations for T.J. Applebee's, and Bill Glennon, the southeast district manager for Del Taco. Newton was also instructed to work more closely with a third person named Sharp, an architect with T.J. Applebee's.

A second meeting was held on January 12, 1984 during which Newton was again instructed to work closely with Palmer and Glennon. Neeb then changed Newton's direct supervisor from Rivera to Paul Puryear, the chief financial officer of Del Taco. Puryear stated he continued to receive complaints about Newton and made numerous attempts to change Newton's business behavior.

A third meeting, this time with Neeb and Puryear, was held on February 12,

1984. Newton was told he was fired because he was not working well with others in the company, specifically Palmer and Glennon. Newton remained in his position until his replacement, 41 year old Jim Barnett, arrived. Newton was 54 years old at this time. Following his dismissal, Newton receive a letter of recommendation from Neeb.

Appellant weakly argues that the district court erred in directing a verdict against him, stating:

> Even if the district court correctly directed a verdict in favor of Grace based on the evidence admitted at trial, Newton should be granted a new trial because the district court's errors in denying pre-trial discovery and excluding key evidence at trial denied Newton "a full and fair opportunity to demonstrate pretext."

Appellant's Reply Brief at 2. The district court was correct in directing

a verdict because Newton failed to prove that he was the victim of a "youth movement" as alleged in his lawsuit. His proof did not go beyond showing that he was a member of a protected group, he was discharged, he was replaced by a younger man, and he was qualified for the position he had been holding. Newton's asserted prima facie case was weak because he was only 54 when discharged and his replacement was 41 (within the protected group). As discussed in Pace v. Southern Ry. System, 701 F.2d 1383, 1389-90 (11th Cir. 1983), a plaintiff must ordinarily show something more. This is certainly true here where the defendants presented evidence to support just cause for discharging Newton, which evidence was largely unrebutted.

The gravamen of Newton's appeal is

that the district court erred in not allowing his discovery to attempt to prove a statistical pattern of age discrimination by the defendants in years prior to Neeb's arrival in 1982. Newton's principal contention is that the district court erred in denying his motion to compel because a comparison of pre-Neeb period data with Neeb period data may indirectly support an inference that officials on the Neeb management team engaged in age discrimination. Grace counters that information tending to show age discrimination during the pre-Neeb period is not relevant and that disclosure of pre-Neeb data is burdensome because the information was not computerized.

A review of the record fails to establish that the exclusion of pre-Neeb

period data prejudiced Newton's case. In particular, Newton's reliance upon Rosenfield v. Wellington Leisure Products, Inc., 827 F.2d 1493 (11th Cir. 1987) to support his position is misplaced. In Rosenfield, the plaintiff, a terminated national accounts manager, introduced evidence that the ages of the employer's national account managers "changed markedly" following a management change. In particular, the five new incoming accounts managers were over ten years younger than the terminated plaintiff. On appeal, the court stated that this evidence "is exactly the sort of indirect evidence which creates an inference that age was a determining factor in the discharge." 827 F.2d at 1497. Thus Rosenfield stands for the unremarkable proposition that

statistical evidence showing that an employer terminated older employees and replaced them with much younger employees during a particular time period is indirect evidence of age discrimination.

Rosenfield, however, does not help Newton's position. As in Rosenfield, Newton had the opportunity to present statistical evidence that Grace terminated older employees and hired younger replacements following the arrival of the Neeb management team. The record establishes that Newton had employment data (or access to such data) relevant to the Neeb period but failed to compile and present such data at trial. Newton nevertheless argues that his inability to present comparisons of pre-Neeb period and Neeb period data

unfairly prevented his from showing pretext. Newton's argument must fail.

Statistical evidence regarding terminations during the pre-Neeb period is relevant as a benchmark for comparison with Neeb period statistics. This statistical comparisen with Neeb period statistics. This statistical comparison, however, lacks evidentiary significance if the Neeb period data itself lacks independent statistical significance. Newton presumably presented no statistical evidence relating to the Neeb period because such evidence did not support an inference of a "youth movement." Thus the statistical evidence regarding the pre-Neeb period is not relevant. Even if there had been statistical evidence of age discrimination against management employees between 1978 and 1982 prior to

Neeb's arrival, this could not help Newton. That would be evidence against Neeb's predecessor and could not demonstrate Neeb's policy. It makes little sense to require the disclosure of pre-Neeb period data for comparison with Neeb period data when the latter's evidentiary value is itself minimal or nonexistent.

The record establishes that Newton acquired or had access to employment data for the Neeb period. The fact that Newton failed to present Neeb period statistics in support of his claim demonstrates that he has suffered no prejudice and was not denied a full and fair opportunity to demonstrate pretext. We therefore hold that the district court did not abuse its discretion in denying Newton's motion to compel

discovery.

Newton also asserts that the district court abused its discretion in excluding Newton's testimony regarding his version of the events underlying the suppliers' complaints that led to his termination.[3] Newton urges that his testimony would have demonstrated that the accounts of the complaints from suppliers to Neeb, Rivera, and Puryear were false. He asserts that the must be permitted to enter evidence that discredits Grace's explanation for his dismissal. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 258, 101 S.Ct. 1087, 1096, 67 - L.Ed.2d 207 (1981) (plaintiff must be given "full and fair opportunity to

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[3]The district court did not exclude the testimony of any witnesses, other than Newton, regarding the events underlying the suppliers' complaints.

demonstrate pretext").

Grace argues that Newton's testimony regarding the objective correctness of events underlying the suppliers' complaints is not relevant in demonstrating that Grace's actions were a pretext for age discrimination. Grace asserts that where an employer's articulated reason for dismissal is that he relied on outside suppliers' complaints, the employer need only show that he believed the complaints were true, not that they were objectively correct.

Grace's position is persuasive. In Moore v. Sears,m Roebuck & Co., 683 F.2d 1321 (11th Cir. 1982), this court stated that:

> It is well settled in employment discrimination cases such as this that for an employer to prevail the jury need not determine that

> the employer was correct in its assessment of the employee's performance; it need only determine that the defendant in good faith <u>believed</u> plaintiff's performance to be unsatisfactory and that the asserted reason for the discharge is therefore not mere pretext for discrimination.

<u>Id</u>. at 1323 n.4 (emphasis in original) (citing <u>Burdine</u>). Thus, <u>Moore</u> supports the proposition that an employer's good faith belief in outside suppliers' complaints about an employee's performance is not a basis for liability. For example, an employer who terminates an employee based on a supplier's erroneous complaint does not engage in unlawful age discrimination provided the employer had no basis for disbelieving the supplier's evaluation. In such a case, the objective correctness of the factual basis for the suppliers' complaints is legally

relevant.[4]

Further, Newton's attempts to litigate the factual basis for the

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[4]An age discrimination plaintiff must present direct or indirect evidence relevant to the issue of the employer's motive in terminating the plaintiff.

> Evidence that casts doubt on the credibility of an employer's articulated reason for an employment decision is relevant only in the sense that it detracts from the likelihood that the employer's proffered motive was the true motive. Once the proffered motive is discredited, it leaves open the entire universe of other possible motives. In order to prove by a preponderance of the evidence that intentional age discrimination was the employer's true motive, the plaintiff would still have to present direct or indirect evidence tending to prove the existence of that illegal motive.

Milone, Age Discrimination: Proving Pretext under the ADEA, 13 Emp. Rel. L.J. 105, 115 (1987). Newton's testimony regarding whether suppliers' complaints were objectively justifiable or not simply does not assist in determining whether Grace's motive in terminating Newton was discriminatory.

suppliers' complaints would unnecessarily protract already lengthy trial proceedings. Newton had other routes by which he could prove that Grace's articulated reasons for dismissal were a pretext for age discrimination. He could have shown that Neeb, Rivera, and Puryear did not receive the suppliers' complaints, had reason to believe the complaints were false, or fabricated the complaints. He could also demonstrate that the nature of the complaints was so inconsequential that they could not have formed the basis for the termination decision. He, however, can not simply litigate the factual basis underlying each event upon which outside suppliers' based their complaints through his own testimony regarding such events.

Conclusion

The district court was correct in denying Newton relief in this case. His age case was weak to start with. There is no indication that plaintiff was the victim of a "youth movement" on the part of the employer. The employer made a rather strong case that Newton was unable to work with his supervisors and colleagues on the management team and that this was the reason for the discharge.

AFFIRMED.

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, NW
Atlanta, Georgia 30303
May 24, 1989

Miguel J. Cortez
Clerk

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

87-8961 Newton v. W. R. Grace & Company and Del Taco Corporation

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Enclosed is a copy of the court's decision filed today in this appeal. Judgement has this day been entered pursuant to Rule 36 of the Federal Rules of Appellate Procedure. Fed.R.App.P. 39, 40 and 41, and the corresponding circuit rules govern costs, petitions for rehearing and mandate, respectively.

To be timely, a petition for rehearing or a suggestion of in banc consideration must be received in the clerk's office within twenty (20) days of the date of judgment. No additional time for service by mail is permitted. See 11th Cir. R. 40-2.

Pursuant to Davidson v. City of Avon Park, 848 F.2d 172 (11th Cir., 1988), if attorney's fees with this office within fourteen (14) days of the date of the court's opinion. Any request for attorney's fees received after that date must be accompanied by a motion to file out of time.

In a direct criminal appeal, 11th Cir. R.41-1 provides that issuance of the mandate shall not be stayed simply upon request: "Ordinarily the motion will be denied unless it shows that is not frivolous, not filed merely for delay, and shows that a substantial question is to be presented to the Supreme Court or otherwise sets forth good cause for a stay."

Counsel appointed under the Criminal Justice Act are reminded that 11th Cir. R. Addendum Four Section (e)(4) provides: "In the event of affirmance or other action adverse to the party represented appointed counsel shall promptly advise the party in writing of the right to seek further review by the filing of a petition for write of certiorari with the Supreme Court. Counsel shall file such petition if requested to do so by the party in writing."

Sincerely,

MIGUEL J. CORTEZ, Clerk

By: _____
Deputy Clerk

Encl.

cc: Richard M. Vega
Homer L. Deakins, Jr.
Margaret H. Campbell

United States District Court

Northern District of Georgia

William C. Newton

Judgment in a Civil Case

V.

W. R. Grace & Company and
Del Taco Corporation

Case Number: C85-4725A

__ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

XX Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered, granting defendants' motion for a directed verdict.

IT IS ORDERED AND ADJUDGED that plaintiff, WILLIAM C. NEWTON, take nothing, that the complaint be dismissed, and that the defendants, W.R. GRACE AND COMPANY and DEL TACO CORPORATION, recover costs of action.***

November 12, 1987
Date

Luther D. Thomas
Clerk

Vicki C. Harra
By Deputy Clerk

EXHIBIT C

29 U.S.C. Section 623 (1967)

623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for any employer -

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this

chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization -

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify

its membership, or to classify or fail or refuse for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Opposition to unlawful practices; participation in investigations, proceedings, or litigation

It shall be unlawful for an employer to discriminate against any of his

employees or applicants for employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) Printing or publication of notice or advertisement indicating preference, limitation, etc.

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be

printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age an occupational qualification; other reasonable factors; laws of foreign workplace; seniority system; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization -

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonable necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age, or where such practices involve an employee in a workplace in a foreign country, and compliance with such subsections would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the

purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Entitlement to coverage under group health plan

(1) For purposes of this section, any employer must provide that any employee aged 65 through 69, and any employee's spouse aged 65 through 69, shall be entitled to coverage under any group

health plan offered to such employees under the same conditions as any employee, and the spouse of such employee, under age 65.

(2) For purposes of paragraph (1), the term "group health plan" has the meaning given to such term in section 162(i)(2) of Title 26.

(g)[1] Practices of foreign corporations controlled by American employers; foreign persons not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the -

(A) interrelation of operations,

(B) common management,

(C) centralized control of labor relations, and

(D) common ownership or financial control,

the employer and the corporation.

29 USC Section 623 (1990 Cum Supp)

(g) Repealed. Pub.L. 101-239, Title VI Section 6202(b)(3)(C)(i), Dec. 19, 1989, 103 Stat. 2233

(h) Practices of foreign corporations controlled by American employers; foreign persons not controlled by American employers; factors determining control

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.

(3) For the purpose of this subsection

the determination of whether an employer controls a corporation shall be based upon the-

(A) interrelation of operations,

(B) common management,

(C) centralized ownership or financial control, and

(D) common ownership or financial control,

of the employer and the corporation.

(i) Firefighters and law enforcement officers attaining hiring or retiring age under State or local law on March 3, 1983

It shall not be unlawful for an employer which is a State, a political subdivision of a State, an agency or instrumentally of a State or a political

subdivision of a State, or an interstate agency to fail or refuse to hire or to discharge any individual because of such individual's age if such action is taken -

(1) with respect to the employment of an individual as a firefighter or as a law enforcement officer and the individual has attained the age of hiring or retirement in effect under applicable State or local law on March 3, 1983, and

(2) pursuant to a bona fide hiring or retirement plan that is not a subterfuge to evade the purposes of this chapter.

(1) Employee pension benefit plans; cessation or reduction of benefit accrual or of allocation to employee account; distribution of benefits after attainment of normal retirement age;

compliance; highly compensation employees

(1) Except as otherwise provided in this subsection, it shall be unlawful for an employer, an employment agency, a labor organization, or any combination thereof to establish or maintain an employee pension benefit plan which requires or permits -

(A) in the case of a defined benefit plan, the cessation of an employee's benefit accrual, or the reduction of the rate of an employee's benefit accrual, because of age, or

(B) in the case of a defined contribution plan, the cessation of allocations to an employee's account, or the reduction of the rate at which amounts are allocated to an employee's

account, because of age.

(2) Nothing in this section shall be construed to prohibit an employer, employment agency, or labor organization from observing any provision of an employee pension benefit plan to the extent that such provision imposes (without regard to age) a limitation on the amount of benefits that the plan provides or a limitation on the number of years of service or years of participation which are taken into account for purposes of determining benefit accrual under the plan.

(3) In the case of any employee who, as of the end of any plan year under a defined benefit plan, has attained normal retirement age under such plan -

(A) if distribution of benefits under

such plan with respect to such employee has commenced as of the end of such plan year, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of the actuarial equivalent of in-service distribution of benefits, and

(B) if distribution of benefits under such plan with respect to such employee has not commenced as of the end of such year in accordance with section 1056(a)(3) of this title and section 401(a)(14)(C) of title 26, and the payment of benefits under such plan with respect to such employee is not suspended during such plan year pursuant to section 1053(a)(3)(B) of this title

or section 411(a)(B) of title 26, then any requirement of this subsection for continued accrual of benefits under such plan with respect to such employee during such plan year shall be treated as satisfied to the extent of any adjustment to the delay in the distribution of benefits after the attainment of normal retirement age.

The provisions of this paragraph shall apply in accordance with regulations of the Secretary of the Treasury. Such regulations shall provide for the application of the preceding provisions of this paragraph to all employee pension benefit plans subject to this subsection and may provide for the application of such provisions, in the case of any such employee, with respect to any period of time within a plan

year.

(4) Compliance with the requirements of this subsection with respect to an employee pension benefit plan shall constitute compliance with the requirements of this section relating to benefit accrual under such plan.

(5) Paragraph (1) shall not apply with respect to any employee who is a highly compensated employee (within the meaning of section 414(q) of title 26) to the extent provided in regulations prescribed by the Secretary of the Treasury for purposes of precluding discrimination in favor of highly compensated employees within the meaning of subchapter D of chapter 1 of title 26.

(6) A plan shall not be treated as

failing to meet the requirements of paragraph (1) solely because the subsidized portion of any early retirement benefit is disregarded in determining benefit accruals.

(7) Any regulations prescribed by the Secretary of the Treasury pursuant to clause (v) of section 411(b)(1)(H) of title 26 and subparagraphs (C) and (D) of section 411(b)(2) of title 26 shall apply with respect to the requirements of this subsection in the same manner and to the same extent as such regulations apply with respect to the requirements of such sections 411(b)(1)(H) and 411(b)(2) of title 26.

(8) A plan shall not be treated as failing to meet the requirements of this section solely because such plan

provides a normal retirement age described in section 1002(24)(B) of this title and section 411(a)(B) of title 26.

(9) For purposes of this subsection -

(A) The terms "employee pension benefit plan", "defined benefit plan", "defined contribution plan", and "normal retirement age" have the meanings provided such terms in section 1002 of this title.

(B) The term "compensation" has the meaning provided by section 414(s) of title 26.

28 USC Section 2101 (1948)

Section 2101. Supreme Court; time for appeal or certiorari; docketing; stay

(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253 and 2282 of this title, holding unconstitutional in whole or in part, any Act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. The record shall be made up and the case docketed within sixty days from the time such appeal is taken under rules prescribed by the Supreme Court.

(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court

EXHIBIT E

in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

(d) The time for appeal or application for a writ of certiorari to review a case before judgment has been rendered

in the court of appeals may be made at any time before judgment.

(e) An application to the Supreme Court for a writ of certiorari to review a case before judgment has been rendered in the court of appeals may be made at any time before judgment.

(f) If any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security,

approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted thereof, or fails to obtain an order gaining his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

F.R.E. 401

Rule 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

EXHIBIT F